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Nos. 88-1664 and 88-6875

In the Supreme Court of the United States

OCTOBER TERM, 1988

GIACOMO DINORSCIO, PETITIONER

v.

UNITED STATES OF AMERICA

GERALD COHEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were entitled under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to an explanation of the prosecutor's decision to strike five jurors with Italian-sounding names.

2. Whether petitioners' enhanced sentences under 18 U.S.C. 3147 (Supp. IV 1986) for committing an offense while on pretrial release are invalid on the ground that petitioners were not, at the time of their pretrial release, given notice of the potential penalty.

3. Whether petitioners showed that the United States District Court for the District of New Jersey systematically excludes blacks, Hispanic-Americans, and persons lacking high school educations from grand juries through its use of voter registration and drivers' license lists.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 864 F.2d 271.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1988. In three separate orders, Justice

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[1] "Pet. App." refers to the appendix to DiNorscio's petition, No. 88-1664.

Brennan granted each petitioner an extension of t me to and including March 23, 1989, within which to petition for a writ of certiorari, and both petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1); petitioners DiNorscio and Cohen were additionally convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Supp. V 1987) (Count 2); and DiNorscio was convicted of a substantive cocaine distribution offense, in violation of 21 U.S.C. 841(a)(1) (Count 3).[2] DiNorscio was sentenced to a single term of 25 years' imprisonment on Counts 1 and 2, which were merged; a concurrent term of 20 years' imprisonment, to be followed by six years' special parole, and a fine of $5000 on Count 3; and a consecutive term of five years' imprisonment under 18 U.S.C. 3147 (Supp. IV 1986) (providing for an additional penalty for an offense committed while on release).

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[2] DiNorscio was acquitted on a count charging him with using the telephone to facilitate a drug violation, in violation of 21 U.S.C. 843(b), and Cohen was acquitted of the Section 843(b) count as well as a substantive cocaine distribution count. Co-defendants Vincent DiPasquale, Gerald DeLuca, and John Sinico were also convicted of conspiracy to distribute cocaine, and DeLuca was convicted of possession of cocaine with intent to distribute it. The court of appeals affirmed their convictions as well. During the trial five other charged co-defendants – Frank Suppa, Manuel Monteiro, Thomas Marino, Dick Pearson, and Robert Fisher – pleaded guilty.

Cohen was also sentenced to a single term of 25 years' imprisonment on the merged Counts 1 and 2, to be followed by a term of five years' imprisonment under 18 U.S.C. 3147 (Supp. IV 1986). Petitioner Truglia was sentenced to a term of ten years' imprisonment. The court of appeals affirmed. Pet. App. 1a-27a.

1. The evidence at trial, the sufficiency of which is not in dispute, derived largely from the testimony of co-conspirators, items seized from DiNorscio's and Truglia's homes, and tape-recorded conversations to which petitioners were parties. The evidence is summarized in the government's brief filed in the court of appeals. It showed that DiNorscio and Cohen were partners in a cocaine operation; it also showed that Truglia assisted in the distribution of the cocaine to wholesalers in New Jersey and other States. DiNorscio and Truglia, who both lived in Florida, received packages of cocaine, tested the drugs, and then arranged for the shipment of the cocaine to New Jersey and other States. At least once a week, and often several times each week, DiNorscio and Truglia also received and counted substantial cash proceeds from the drug sales.

2.a. During jury selection, the government exercised seven of its allotted nine peremptory challenges. See Pet. App. 31a-32a. It used five of those seven challenges to remove jurors with Italian-sounding surnames. *Id.* at 9a. Petitioner DiNorscio requested a *Batson* hearing[3] to require the government to explain its non-ethnic reasons for removing the five jurors, although counsel conceded at the time that "[i]t's impossible to tell by the names"

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[3] See generally *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

whether the jurors were Italian-Americans (Pet. App. 13a).

The trial judge concluded that *Batson* was limited to racially discriminatory practices and did not apply to the removal of Italian-Americans. Pet. App. 30a. She also noted that the defendants struck two persons with Italian surnames as well and that "at least one Italian-American" remained on the jury. *Id.* at 31a, 34a. (In fact, two jurors with Italian-sounding surnames remained on the jury. *Id.* at 10a.) The trial judge noted that she was best positioned "to see, to hear, and to protect against discrimination." *Id.* at 31a. She then referred to two of the jurors whom the government struck and explained that "[t]he two jurors I most clearly remember, both very young men, should have been challenged by any responsible prosecutor on grounds having nothing to do with their ethnic background." *Id.* at 32a. The first, she noted, "was a caricature of a young tough." *Ibid.* She described the second as a "wise guy" who initially said he would favor Italian-Americans because he was one, then recanted that statement, but the judge "frankly did not believe him for a minute." *Id.* at 33a-34a. As the trial judge summarized, "[i]f the government had not challenged these two clowns it would have been remiss in its duties." *Id.* at 34a. Accordingly, the trial judge denied the defense request for a *Batson* hearing at which the government would be obligated to proffer a neutral explanation for its use of its peremptory challenges to remove the jurors with Italian-sounding names.

b. The court of appeals affirmed. Pet. App. 9a-14a. It did not address the district court's ruling that *Batson* applies only to the use of peremptory challenges for racially discriminatory reasons (*id.* at 10a & n.9), but it

assumed arguendo that *Batson* applies to any cognizable ethnic or racial group (*id.* at 12a). The court concluded, however, that petitioners failed to establish that persons with Italian surnames constitute a cognizable group singled out for discrimination and disparately represented on juries in New Jersey. *Id.* at 12a, 13a. The court found in the record no evidence apart from the surnames that the five excluded jurors were members of a single ethnic group. And the court noted that, as petitioner DiNorscio conceded in the district court, it was "impossible" to determine whether the prospective jurors were Italian-Americans by their names alone. *Id.* at 13a. Nor was there any evidence that people with Italian-sounding surnames – who may not be Italian-Americans – comprise a single identifiable ethnic group. *Id.* at 14a. Thus, the court concluded, "DiNorscio has failed to carry his burden of demonstrating that a cognizable group for *Batson* purposes was impermissibly excluded from his jury and, therefore, we conclude that he has failed to establish a *prima facie* case of discrimination in the government's use of its peremptory challenges." *Ibid.*

3. The court of appeals also affirmed two other rulings by the district court that are pertinent here. First, the court held that petitioners DiNorscio and Cohen were properly given enhanced sentences under 18 U.S.C. 3147 (Supp. IV 1986) for committing crimes while on pretrial release. Pet. App. 18a-23a. The court rejected petitioners' contention that Section 3147 creates a separate offense that must be separately charged and presented to the jury, and their further contention – raised for the first time on appeal – that Section 3147 cannot be invoked if the defendants were not notified at the time of

their pretrial release of the penalties for committing crimes while on pretrial release.

Second, the court rejected a claim that the alleged underrepresentation on the grand jury of blacks, Hispanics, and persons with less than a high school education violated the Sixth Amendment's guarantee of an impartial jury. Pet. App. 23a-27a. The court bypassed two of the three factors in the test established by *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979), because petitioners had not made the requisite showing of the third factor, systematic exclusion in the jury selection process. The court noted that under the "New Jersey Plan" grand jurors are drawn from voter registration lists and automobile drivers' license lists, and that Cohen had made no showing that use of the latter list could lead to underrepresentation. As the court explained, "Cohen's conclusory statement that supplementation with drivers lists is 'obviously insufficient' in these 'peculiar urban communities' simply does not meet the most minimum requirement for making out a *prima facie* case." Pet. App. 27a.

ARGUMENT

1. Petitioners contend (DiNorscio Pet. 14-33; Cohen Pet. 11-18) that the prosecutor's decision to strike five jurors with Italian-sounding surnames constituted an impermissible use of peremptory challenges under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The court of appeals' rejection of that argument appears to rest on two alternative grounds. First, assuming without deciding "that the holding of *Batson* is not limited to black Americans, and applies to any ethnic or racial group that meets the criteria of cognizability delineated by the Supreme Court," Pet. App. 12a, the court held that Italian-Americans were

not a "cognizable" group. *Id.* at 10a-14a. Second, the court cited with apparent approval the district court's determination that "DiNorscio had not made the requisite factual showing * * * that *any* group was actually excluded." *Id.* at 10a. Further elaborating that point, the court of appeals found it significant that the final jury included two jurors with Italian surnames, and it concluded that petitioners had "failed to establish a *prima facie* case of discrimination in the government's use of its peremptory challenges." *Id.* at 14a. Those conclusions support the judgment of the court of appeals, which does not warrant review by this Court.

a. The court of appeals correctly held that petitioners had not shown that Italian-Americans are a "cognizable" group for *Batson* purposes, and its holding does not conflict with any decision of another court of appeals. Other than blacks, the only groups that any court of appeals has held to be "cognizable" for *Batson* purposes are Hispanics (*United States* v. *Alcantar*, 832 F.2d 1175, 1179-1180 (9th Cir. 1987)), American Indians (*United States* v. *Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987)), and whites (*Roman* v. *Abrams*, 822 F.2d 214, 227 (2d Cir. 1987), cert. denied, 109 S. Ct. 1311 (1989)). By contrast, the courts of appeals have rejected attempts to extend *Batson* to nonracial contexts. See *United States* v. *Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988) (women not a cognizable group under *Batson*), petitions for cert. pending, Nos. 88-5772 et al.; *Graham* v. *Lynaugh*, 854 F.2d 715, 722-723 (5th Cir. 1988) (18-year-olds not a cognizable group under *Batson*); *United States* v. *Cresta*, 825 F.2d 538, 545 (1st Cir. 1987) (young adults not a cognizable group), cert. denied, 108 S. Ct. 2033 (1988); *United States* v. *Sgro*, 816 F.2d 30, 32-33 (1st Cir. 1987) (defendants

made insufficient showing that Italian-Americans are a cognizable racial group), cert. denied, 108 S. Ct. 1021 (1988); *United States* v. *Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986) (black males as opposed to blacks not a cognizable group under *Batson*), cert. denied, 481 U.S. 1037 (1987). The decision of the court of appeals thus fits comfortably within a consistent pattern of decisions in the courts of appeals.

United States v. *Biaggi*, 853 F.2d 89 (2d Cir. 1988), cert. denied, 109 S. Ct. 1312 (1989), is not to the contrary. The Second Circuit in *Biaggi* did not analyze the question whether Italian-Americans constitute a cognizable ethnic group. The court merely accepted without question the district court's conclusion that *Batson* applies and rejected the defendant's claim on the merits. Any conflict between the holding of the district court in *Biaggi* and the court of appeals here would not merit this Court's attention. But in any event there is no such conflict. The district court in *Biaggi* found that "Italian-Americans *in this district*" satisfy the criteria for determining a cognizable group. *United States* v. *Biaggi*, 673 F. Supp. 96, 100 (E.D.N.Y. 1987) (emphasis added). *Biaggi* is thus limited to the Eastern District of New York and cannot be read more broadly to require that Italian-Americans universally be recognized as a cognizable group. Indeed, the district court in *Biaggi* emphasized that its decision was not in conflict with the First Circuit's holding in *United States* v. *Sgro*, *supra*, that Italian-Americans had not been shown to be a "cognizable" group, because the court in that case reached a different conclusion on the basis of different facts and relevant circumstances. 673 F. Supp. at 101.

The consistent pattern of decisions in the courts of appeals reflects a correct understanding of *Batson*. *Batson* arose out of this Court's longstanding commitment to ensuring that jury selection is not infected by racial discrimination. In *Batson*, the Court relied heavily on its decision in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), which held that a State "denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson*, 476 U.S. at 85. Moreover, the Court repeatedly emphasized that the harm it sought to redress was that caused by purposeful racial discrimination. *Id.* at 86-88 (discussing evils inherent in racial discrimination in selection of venire); *id.* at 88-89 (reaffirming that peremptory challenges cannot be used to achieve "purposeful racial discrimination"); *id.* at 93-98 (relying on prior racial discrimination cases to delineate methods and burden of proving racial discrimination in selection of petit jury); *id.* at 98-100 (limitations on use of peremptory challenges outweighed by need to "ensure that no citizen is disqualified from jury service because of his race"); *id.* at 100-102 (White, J. concurring) (need to overturn *Swain* v. *Alabama*, 380 U.S. 202 (1965), demonstrated by "widespread" practice "of peremptorily eliminating blacks from petit juries").[4] The Court took pains to

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[4] See also *Brown* v. *North Carolina*, 479 U.S. 940, 940-941 (1986) (O'Connor, J., concurring in denial of certiorari) (*Batson* "depends upon this Nation's profound commitment to the ideal of racial equality" and does not extend to jurors' attitudes); *Gray* v. *Mississippi*, 481 U.S. 648, 672 (1987) (Powell, J., concurring in part and concurring in the judgment) (decision in *Batson* "justified by the compelling need to remove all vestiges of invidious racial discrimination in the selection of jurors").

emphasize that, beyond the narrow sphere encompassed by the need to combat racial discrimination in jury selection, "the peremptory challenge occupies an important position in our trial procedures," *Batson*, 476 U.S. at 98, and that a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason at all, *id.* at 89.

In these circumstances, the courts of appeals have properly hesitated to extend *Batson* to nonracial groups in the absence of a compelling showing that such groups have suffered discrimination comparable to that suffered by blacks. And, of course, there was no such showing in this case. To the contrary, petitioners rest their case entirely on the proposition that no such showing should be required and that this Court should find Italian-Americans to be a cognizable group on the basis of judicial notice. DiNorscio Pet. 22-26; Cohen Pet. 14-15.

Furthermore, petitioners are not well situated to argue that commonly recognizable surnames are sufficient to identify a member of the cognizable ethnic group of Italian-Americans. Although they contend now that "[t]he shared ancestry of Italian-Americans is easily identifiable in their Italian surnames" (DiNorscio Pet. 21; Cohen Pet. 14), the contrary point was conceded in the district court when petitioner DiNorscio agreed – with no dissent from his co-defendants – that it was "impossible" to place an individual within that ethnic group simply by virtue of his surname. See Pet. App. 13a. In short, petitioners not only failed to press their claim that the district court should take judicial notice that the ethnic group of Italian-Americans is "easily identifiable," but they disavowed that claim explicitly. As the court of appeals stated, "DiNorscio offered no evidence from which the district court could reasonably have found that persons with Italian surnames are reliably identified as

members of a single ethnic descent, or that persons with such surnames 'either have been or are currently subjected to discriminatory treatment.'" Pet. App. 13a. Thus, even if there were some conflict in results among the circuits as to what constitutes a "cognizable" group, this would not be an appropriate case in which to consider that issue.

b. Even if it were clear that Italian-Americans in the District of New Jersey should be held to be a "cognizable" group for *Batson* purposes, the judgment of the court of appeals would still be correct, since the district court appropriately determined, and the court of appeals affirmed, that petitioners did not make out a prima facie case of discrimination against Italian-Americans. Out of nine prospective jurors with Italian-sounding surnames, two sat on the jury, two were struck by defense counsel, and five were struck by the government. Among the five struck by the government, two were such obvious candidates for peremptory challenge, on non-ethnic grounds, that the district court stated the government would have been remiss if it had not struck them. Thus, the government used only three unexplained challenges to strike jurors with Italian-sounding surnames – only one more challenge than the defendants themselves exercised against such jurors. Moreover, at the end of jury selection, the government had two unexercised challenges. "[A]ll relevant circumstances," *Batson*, 476 U.S. at 96-97, lead readily to the conclusion on these facts that no prima facie case of discrimination was made out. See *United States* v. *Dennis*, *supra* (no prima facie case when prosecutor used three of seven strikes to remove blacks and petit jury included two blacks); *United States* v. *Montgomery*, 819 F.2d 847, 850-851 (8th Cir. 1987) (no prima facie case when prosecutor used two of six strikes to

remove blacks, defense counsel removed a third black, and one black sat on jury); *United States* v. *David*, 662 F. Supp. 244, 246 (N.D. Ga. 1987) (no prima facie case when prosecutor used three of seven strikes to remove blacks and petit jury included one black), aff'd, 844 F.2d 767 (11th Cir. 1988). The district court, to which the prima facie case determination is entrusted (*Batson*, 476 U.S. at 97, 99 n.22), found in these circumstances that "[t]his application is bottomed on * * * utterly nothing either factual or legal." Pet. App. 34a.

There is no tension between the Third Circuit's statement that it is "significant[]" that two members of the jury had Italian surnames, Pet. App. 14a, and the correct statement in *United States* v. *Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987), vacated in part on other grounds, 836 F.2d 1312 (11th Cir.), cert. dismissed, 109 S. Ct. 28 (1988), that "the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." As the Eleventh Circuit recognizes, see *United States* v. *Dennis*, *supra*, the defendant must make out a prima facie case of discrimination before the government is called on to justify any strike, and the presence of members of the allegedly discriminated-against group on the jury is one significant factor in determining whether the defendant has met that burden. The Third Circuit is precisely in accord: in the present case, the court properly attached significance to that factor as one among several factors indicating the lack of a prima facie case, and in *United States* v. *Clemons*, 843 F.2d 741, 748, cert. denied, 109 S. Ct. 97 (1988), the same court recognized that it could not conclude that by itself the "inclusion of blacks on a jury bars a prima facie case, especially where

other facts and circumstances may constitute an inference of prosecutorial discrimination in the selection process." Compare also *United States* v. *Montgomery*, 819 F.2d at 850-851 (presence of blacks on jury together with existence of unexercised peremptory challenges prevents inference of prima facie case), with *United States* v. *Johnson*, No. 88-2225 (8th Cir. May 2, 1989) (same court concludes that prima facie case was shown despite presence of at least two blacks on the petit jury).

In short, the holding below that petitioners failed to establish a prima facie case of discrimination (even assuming that Italian-Americans are a "cognizable" group) properly rests on a number of facts and circumstances, including the presence of persons with Italian-sounding surnames on the jury and the government's failure to exercise all of its peremptory challenges. The court of appeals did not treat either of those facts as conclusive, but rather accepted a district court determination based on "all relevant circumstances," as specifically directed by *Batson*, 476 U.S. at 96-97. The court therefore followed the same approach as the Eighth and Eleventh Circuits and not, as petitioners contend, a contrary approach. There is no reason for this Court to review the issue.

2. Petitioners DiNorscio and Cohen challenge their consecutive sentences of five years' imprisonment under 18 U.S.C. 3147 (Supp. IV 1986).[5] DiNorscio Pet. 33-36;

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[5] Section 3147, as applicable before November 1, 1987, provided:

Penalty for an offense committed while on release

Cohen Pet. 30. Petitioners contend that no sentence can be imposed under Section 3147 unless the release order giving rise to the enhanced penalties under Section 3147 specifically informed the defendant of the penalties for committing an offense while on pretrial release. The court of appeals held that such notice is not a precondition to the imposition of sentence under Section 3147. Pet. App. 20a-23a. The court correctly reasoned that, although 18 U.S.C. 3142(h)(2)(A) (Supp. V 1987) requires such notice, a Section 3147 sentence should not fall because of the failure to comply with Section 3142(h)(2)(A), because "[t]he purpose of such advice is solely to impress upon the person the seriousness of failing to appear when required," S. Rep. No. 225, 98th Cong., 2d Sess. 25 (1984), and not to divest sentencing courts of the power to carry out Congress's will whenever an error has been made by the court that granted the

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> A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to –
>
> > (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or
> >
> > (2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

Effective November 1, 1987, the minimum terms of imprisonment in subsections (1) and (2) have been eliminated. See 18 U.S.C. 3147 (Supp. V 1987).

defendant's release. See also *United States* v. *Feldhacker*, 849 F.2d 293, 299 (8th Cir. 1988) (dictum).

The reasoning of the court of appeals in rejecting petitioners' contention conflicts with the decisions of two other circuits that regard notice under Section 3142(h)(2)(A) as a precondition to sentencing under Section 3147. See *United States* v. *Cooper*, 827 F.2d 991, 994-995 (4th Cir. 1987); *United States* v. *DiCaro*, 852 F.2d 259, 264-265 (7th Cir. 1988). Petitioners, however, are not entitled to review by this Court, for two related reasons. First, the claim that petitioners now raise was not raised in the trial court and therefore should not be entertained here.[6] Second, petitioners completely failed to demonstrate in the district court – and have not even alleged in this Court – that they in fact were not notified of the penalties for committing an offense while on pretrial release. The record is accordingly devoid of any factual support for the proposition that petitioners lacked the notice that they contend is necessary in order for their Section 3147 sentences to be valid. See Pet. App. 20a ("DiNorscio * * * did not claim, at his sentencing,

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[6] DiNorscio erroneously suggests that the court of appeals rejected the government's contention that he failed to preserve this issue in the district court. DiNorscio Pet. 13 n.2. The court of appeals rejected the government's contention that DiNorscio failed to preserve a *different* argument pertaining to Section 3147 – that it establishes a criminal offense rather than merely a sentence enhancement. Pet. App. 18a n.12. No petitioner has pressed that argument in this Court. The argument that petitioners do press here – that Section 3147 cannot be applied in the absence of notice of its penalties at the time of pretrial release – was "raise[d] * * * for the first time on appeal," as the court of appeals expressly observed. *Id.* at 20a.

that he was unaware that he was subject to this penalty, and raises the claim for the first time on appeal.").

Even if petitioners' contentions did not suffer from those fatal defects, the conflict between the reasoning below and the reasoning of the Fourth and Seventh Circuits still would not merit this Court's review. The defendants in *DiCaro* and *Cooper* were both released before the effective date of Section 3142(h)(2)(A) (October 12, 1984). There is as yet no reported case in which a defendant released after the effective date of Section 3142(h)(2)(A) has shown that he failed to receive notice, as required by that section, of the penalties for committing an offense while on pretrial release.[7] There is therefore no reason to believe that a significant number of cases will arise in which courts have released defendants after October 12, 1984, but have failed to carry out their responsibility to give notice under Section 3142(h)(2)(A). The issue that petitioners raise accordingly would not be of sufficient continuing importance to warrant a grant of certiorari even if it had been properly preserved.

3. Petitioners Cohen and Truglia contend (Cohen Pet. 19-29) that the grand jury that indicted them did not represent a cross-section of the community, because blacks, Hispanics, and persons with less than a high school education were underrepresented on the master list from which the grand jury was selected. They urge that their showing met this Court's standards in *Duren* v. *Missouri*, 439 U.S. 357 (1979), and that the courts below erred in denying relief.

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[7] As we have noted, there has been no showing in this case that petitioners were not given the warning required by Section 3142(h)(2)(A).

Duren v. *Missouri*, 439 U.S. at 364, requires that a defendant asserting a constitutional defect in the selection of grand jurors show that (1) the excluded group is distinctive in the community; (2) the group's representation in jury pools is not fair and reasonable in relation to the number of its members in the community; and (3) the underrepresentation is due to systematic exclusion in the jury selection process. The court of appeals properly noted the *Duren* considerations and the requirement that all three factors be proved. Without addressing factors (1) and (2), the court concluded that petitioners failed in their showing that there is systematic exclusion of blacks, Hispanics, and the less educated in the selection process. Pet. App. 25a. The court specifically noted that in the District of New Jersey potential jurors are selected from voter registration and drivers' license lists. *Ibid.* It then found that petitioners failed to explain why the use of these two sources was inadequate to include a fair cross-section, including the groups allegedly excluded. *Id.* at 26a-27a. Concluding that petitioners failed to show in particular how the use of drivers' license lists would result in underrepresentation of distinct groups, the court of appeals found that petitioners "ha[ve] not made out a *prima facie* case of systematic underrepresentation in the grand jury venire." *Id.* at 27a.

Most of petitioners' discussion of this issue (Cohen Pet. 20-26) is devoted to the two issues on which the court of appeals assumed (without deciding) that petitioners *had* met their burden under *Duren*. When petitioners finally do address the issue that the court of appeals found dispositive, they urge the Court to "overrule that finding [that there was not a prima facie case of systematic exclusion]" – a task that this Court ordinarily

will not undertake[8] – on three grounds. They first urge that "the voter registration lists and the driver registration lists do not fairly represent the community." *Id.* at 28. Yet petitioners do not cite a single case in which the use of voter lists has been held inadequate, and they completely fail to show how the use of voter lists, as supplemented by drivers' license lists, leads to systematic exclusion in the selection process. Thus, petitioners fail to address the basic flaw that the court of appeals found in their argument: their failure to explain how the use of driver lists could lead to systematic underrepresentation. Pet. App. 27a. Petitioners urge that "there appears to be an improper merging of lists." Cohen Pet. 28. Yet no elaboration, factual or legal, is offered to support that assertion.

Finally, in the sole paragraph of their petition that addresses the issue that the court of appeals found dispositive, petitioners urge that the defect in the use of drivers' license lists is that they contain bad addresses, and that "Blacks, Hispanics and the less educated tend to be disproportionately transient and it is expected that a large number of 'bad addresses' are of potential Blacks, Hispanics and less educated jurors." Cohen Pet. 28. Yet that argument was never made – much less supported by evidence – in the courts below, where petitioners dealt with this issue only in a conclusional footnote to their motion in the district court. See Pet. App. 27a. Moreover, petitioners do not explain what source might exist that would contain significantly fewer bad addresses than drivers' license lists. Their sole suggestion as to how the government might alleviate the alleged

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[8] See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

disparity – better follow-up on bad addresses – rests on the unsupported factual assertion that "there appears to have been little, if any follow-up of unreturned questionnaires," Cohen Pet. 28, an assertion that was refuted by the affidavit of a district court clerk (C.A. Supp. App. 104-105).

Petitioners' attempts to cure the defects in their showing on the third *Duren* factor thus are factually unsupported and come too late. As the court of appeals concluded, petitioners' showing below "simply [did] not meet the most minimum requirement for making out a *prima facie* case." Pet. App. 27a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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